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No. 90-97

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

AMERICAN HOSPITAL ASSOCIATION,
Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD, Et Al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE FEDERATION OF AMERICAN HEALTH SYSTEMS AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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The Federation of American Health Systems ("FAHS") submits this brief, as *amicus curiae*, in support of the American Hospital Association's ("AHA") petition for a writ of certiorari, and urges this Court to review, and reverse, the Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit entered in these proceedings on April 11, 1990.

FAHS files this brief with the consent of the parties herein, and their written consents are filed concurrently herewith.

INTEREST OF AMICUS CURIAE

Federation of American Health Systems ("FAHS") is an Internal Revenue Code Section 501(c)(6) organization which represents the interests of approximately 87 hospital management companies and approximately 258 independent investor-owned hospitals before the federal government. Together these companies presently own or operate 1,392 hospitals with a total of 168,475 beds. In addition, the management companies manage under contract an additional 329 not-for-profit hospitals in the United States and Puerto Rico, with an additional 36,836 beds. FAHS members own, operate and/or manage hospitals in all fifty states, the District of Columbia and Puerto Rico. In many cases the members operate hospitals in rural areas or small cities and towns, where they are the only provider of acute care services. FAHS has a direct interest in these proceedings because all of the investor-owned acute care hospitals, and many of the managed acute care hospitals, are subject to the National Labor Relations Board's ("Board") new health care bargaining unit Rule ("Rule"), 29 C.F.R. § 130.30. The Rule could affect each FAHS member who becomes a party to the representation procedures of the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* (the "Act").

INTRODUCTION AND SUMMARY OF ARGUMENT

FAHS is concerned that, if permitted to stand, the court of appeals' opinion upholding the Rule, inter alia, eliminates an acute care hospital employer's right to be heard at a meaningful time and in a meaningful manner in bargaining unit determination proceedings. The Board's Rule establishing fixed appropriate bargaining units for acute care hospitals not only constitutes a breach of the Board's duty to investigate representational issues

on a case-by-case basis, it also denies procedural due process to the employer.

FAHS concurs with petitioner AHA's position before the lower courts and this Court regarding the extent of the Board's rulemaking authority in proceedings under Section 9 of the Act, 29 U.S.C. § 159 ("Section 9") and the Board's failure properly to consider the unduly proliferative effects of the Rule's eight units. FAHS further respectfully submits that the Board and the court of appeals failed to give due consideration to the existing diversity and to the continuing changes that are occurring within the health care industry. If permitted to stand, the decision of the court of appeals to uphold the Rule will needlessly and improperly impinge upon a hospital's ability to adapt and change its operating structure and work force in response to the realities of the changing health care economic environment—to the detriment of the health care industry as well as the public at large, which relies upon the ready availability of high quality and uninterrupted health care services.

The record of the Board hearings conducted before adoption of the Rule is replete with evidence regarding the diversity—size, location, patient population, workforce structures, reimbursement structures and mission—in the health care industry. The Board, however, ignored this evidence, as well as its own past findings regarding the diversity of the industry, and based its unit determinations instead upon supposed historical and uniform divisions and distinctions between employee groups. In so doing, it disregarded the substantial evidence of increasing integration and overlapping of work functions, new and developing multi-disciplinary team approaches, and restructurings of traditional operational and managerial systems. Even assuming *arguendo* that the current state of diversity is such that the Board's conclusions could have some present rational underpinning, further diversification of health care delivery systems, and the resulting changes on the structure and utilization of the workforce, must and will continue into the future as health care employers search for new and innovative methods for dealing with the critical national problems of rising health care costs, an increasingly acutely ill patient population and reduced or changing governmental and third party reimbursement structures.

The district court below correctly noted that the Board's Rule mandates automatic fragmentation of the bargaining units in a diverse and changing health care industry, stating:

> In sum, we find that Section 9(b) of the NLRA does not entirely foreclose the Board from promulgating rules with respect to appropriate collective bargaining units. Congress, however, enunciated a specific concern for the vulnerability of the health care industry to labor unrest. In light of this vulnerability Congress admonished the Board to give due consideration to undue proliferation of bargaining units in this industry. A rule which designates an absolute number of appropriate units and mandates a particular division of the workforce, especially in the health care field where employees' work environment varies widely, is not responsive to Congress' express concern. *In fact, as noted above, such a rule encourages, and perhaps coerces, fragmentation of the labor force within particular health care facilities.*

(Petitioner's App., pp. 41a-42a.) (Emphasis supplied.) The court of appeals, although it reversed the district court's grant of an injunction against enforcement of the Rule, also conceded that the Rule does not account for distinctions in a changing health care industry stating:

> The lumping together of all acute-care hospitals into one category for purposes of prescribing proper bargaining units does of course overlook a great deal of relevant diversity. . . . A rule makes one or a few of a mass of particulars legally decisive, ignoring the rest.

(Petitioner's App., pp. 14a-15a.)

Indeed, even the Board itself had previously acknowledged that "[the] diverse nature of today's health care industry . . . precludes any generalization as to the appropriateness of any particular bargaining unit." *St. Francis Hospital,* 271 NLRB 948, 953 n.39 (1984). Yet, only five years after making that observation the Board cavalierly discounted this diversity as anomalous and insignificant, and instead found the health care industry sufficiently uniform and identical with respect to the factors central to determining appropriate units to justify establishing fixed units. NPR I, 52 Fed. Reg. at 25145.

Based on this "finding," the Board established eight (8) health care bargaining units, which may be challenged by a hospital only

if it can show "extraordinary circumstances." As defined by the Board, however, the extraordinary circumstances exception is an artifice, and anything but an "open ended exception" as the court of appeals erroneously characterized it. It provides no meaningful opportunity for a hospital to present evidence regarding the factors that have always been and, in fact, continue to be, central to appropriate unit determinations. Thus, it denies the acute care hospital the opportunity to show that, despite the presumed similarity among institutions, the circumstances in its particular case warrant a different result. The Act and the due process guarantees of the Fifth Amendment to the Constitution of the United States do not permit this result, and FAHS urges this Court to grant review and to reaffirm that acute care hospitals are entitled to the same basic procedural due process rights as are accorded other employers.

ARGUMENT

The Rule raises a crucial constitutional issue regarding the extent to which the Board may deprive an acute care hospital of due process in its representation proceedings. The court of appeals decided the narrow issue that the Board had authority to bring the unit determination process in the health care industry under the aegis of an administrative rule. However, the question of whether the Rule, as the Board has announced that it will apply it, affords hospitals the procedural due process required to pass constitutional muster was neither raised nor addressed. FAHS demonstrates herein that, inasmuch as the Board's unit determinations can and do substantially affect an acute care hospital's liberty and property interests, the Rule upheld below does not comport with this Court's longstanding concern for the protection of due process rights, and the court of appeals opinion sustaining the Rule should be reviewed and, ultimately, reversed. *See, e.g., Goldberg v. Kelly,* 397 U.S. 254, 25 L.Ed.2d 287 (1970); *Den v. The Hoboken Land and Improvement Co.,* 59 U.S. 277 (1855).

I

THE BOARD'S RULE DENIES PROCEDURAL DUE PROCESS TO HOSPITALS

The Rule's mandate of eight units without provision for an evidentiary hearing on the appropriateness of those units in the context of an individual hospital's circumstances substantially affects the investment-backed expectations of investor-owned hospitals, the right and freedom of all private hospitals to pursue a common occupation or calling, and the right of all hospitals to contract—all constitutionally protected property and/or liberty interests. *See Ruchelshaus v. Monsanto,* 467 U.S. 986, 1012 (1984); *Board of Regents v. Roth,* 408 U.S. 564, 572 (1972); *Hardware Dealers' Mutual Fire Ins. v. Glidden Co.,* 284 U.S. 151, 157 (1931). The Due Process Clause of the Fifth Amendment to the Constitution of the United States ("Due Process Clause") restricts both the powers of all three branches of the federal government and those of any administrative agencies created to implement and enforce their laws, orders or decisions, when the exercise of such powers may result in a denial of any person's life, liberty or property. *See e.g., Den v. The Hoboken Land and Improvement Company,* 59 U.S. 272 (1855); *Richardson v. Perales,* 402 U.S. 389, 1426-1427 (1971).

"Due process" is not a concept that can be categorically stated or mechanically applied. Rather, the requirements of due process vary with the nature of any given situation. *Mathews v. Eldridge,* 424 U.S. 319 (1976); *Hannah v. Larche,* 363 U.S. 420 (1960). Relevant to a determination of the extent and nature of the requirements of due process in a particular case are: (1) the nature of the alleged right involved; (2) the length of the possible deprivation of the interest involved; (3) the risk of an erroneous deprivation; (4) the nature of the proceeding; and (5) the government's interest involved. *Mathews v. Eldridge, supra.* The fundamental requirement of due process remains the right to be heard "at a meaningful time and in a meaningful manner." *Mathews, supra,* at 333; *Armstrong v. Manzo,* 380 U.S. 545 (1965).

When the aforementioned factors are considered, it is clear that the Board's Rule does not afford that right, and therefore does not afford the due process required in such proceedings.

A. The Act's Mandatory Collective Bargaining Provisions Substantially Affect A Hospital's Liberty And Property Interests

In the absence of a certified collecting bargaining representative, an employer is free to contract with employees individually or on whatever broader base it chooses.[1] However, once a bargaining representative is certified for a particular group of the employer's employees, the Act greatly restricts those rights and freedoms, and the employer loses the ability to contract with those employees individually and according to its needs or circumstances. Instead, a mandatory bargaining relationship is artificially imposed by statute upon the employer, and it must bargain for a contract covering the certified unit. The employer can no longer lawfully make changes regarding "rates of pay, rules and working conditions"[2] within that unit unless and until agreement or impasse is reached with the bargaining representative.[3] These statutorily imposed obligations and restrictions are enforceable against the employer through both administrative and judicial process. 29 U.S.C. § 160. Thus, certification of a collective bargaining representative through the representation procedures

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[1] Subject only to the general law of contracts (and various specific wage and hour and antidiscrimination laws), a hospital is normally free to alter the terms and conditions of its contracts with employees or groups of employees if it deems changes to be necessary. For instance, if circumstances warrant or dictate a change, the hospital is free to reassign, recombine or otherwise alter the duties of its employees; alter schedules or methods of scheduling; alter the pay or pay structure; contract with another entity for the provision of services formerly provided by its own employees; alter the size and makeup of its workforce; etc.

[2] A myriad of items are covered by the phrase "rates of pay, rules and working conditions," including scheduling, workforce size and makeup, job functions, and utilization of employees and equipment, to name but a few, and a restriction on any one of these areas has a substantial impact upon a hospital's exercise of its liberty and property rights in the operation of its business.

[3] As a practical matter, the statutory bargaining obligation affords the group's representative the ability to delay, inhibit or prevent an employer's attempt to make timely, appropriate changes in the manner by which it conducts its business activities, and/or to allocate its resources in the manner it feels is most productive and beneficial, without regard for the reasonableness and/or necessity of such actions.

of Section 9 substantially restricts an employer's freedom to employ capital effectively, to assign and reassign work, or otherwise to change the manner by which it conducts its business.

The Board's unit determination lies at the very heart of this administrative process whereby an employer may be deprived of, or greatly restricted in the exercise of, substantial property and liberty interests. It is that determination which establishes and defines the group with which the employer must bargain as a distinct entity. Where there are two or more separately represented employee groups, the restrictions are compounded. While these are restrictions that Congress may validly impose as a general matter pursuant to its broad commerce powers, if the grouping(s) resulting from the Board's unit determination bear(s) no reasonable relationship to the employer's structure and operations, then the resulting adverse effects of the restrictions upon the employer's ability effectively to employ capital and operate its business are further and improperly exacerbated.

B. The Effects Of Unit Determinations Are Long Term And Potentially Permanent

The restrictions placed on an employer's rights and interests by virtue of the representation process are substantial. A unit certification can have a long term impact, since once a bargaining representative is certified for a particular unit it can potentially retain that status for as long as the employer remains in business. The employer has no unilateral ability to alter or terminate that status short of going out of business in whole or in part, or subcontracting out the work performed by bargaining unit employees.[4] Despite this fact, the Board expressly crafted the Rule in a manner designed to prevent the employer from challenging or obtaining any review of its application to the employer. Accordingly, the adverse impact of an erroneous administrative unit determination may, as a practical matter, be permanent.

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[4] Even in these circumstances the employer has a duty to bargain, either over the decision and its effects or over the effects alone, depending upon the circumstances. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

C. The Rule Denies An Employer Any Meaningful Opportunity To Be Heard In Administrative Proceedings That Affect Its Liberty And Property Rights And Interests

The appropriate unit is determined through an administrative hearing to which the employer and the petitioner seeking to represent a group of the employer's employees are parties. Over the decades since the Act's enactment, the Board has identified and refined a number of factors that it considers relevant and central to determining an appropriate unit. These factors concern whether or not the work-related conditions and interests of various employees are such that those employees can effectively bargain as a group over wages, hours and other conditions of employment. Not surprisingly, consideration of these factors as they exist in the case of a particular employer typically leads to units that reflect the divisions of the workforce based upon its operating structure, since those divisions tend also to mark a division of the relevant interests of groups of employees.

Heretofore, each party has always been afforded the opportunity to appear at the hearing and present evidence regarding the relevant factors. Thus, over the years, the Board has been able to exercise its discretion and judgment after consideration of a complete evidentiary record. As a practical matter, because most of the relevant factors concern the employer's operations, policies, procedures, benefits, wage scales and structures, supervisory structures, etc., the employer's participation has always been an essential part of this process, particularly since the employer has exclusive access to much of the relevant evidence.

In developing its Rule, the Board never once suggested that it had concluded that the unit determination factors it considers relevant in every other industry (including the entire health care industry before promulgation of the Rule) are no longer relevant to acute care hospitals. To the contrary, the Board examined those very factors, but concluded that they exist with sufficient uniformity throughout the industry to warrant its inflexible Rule.[5]

[5] The Boards broad statement that its experience in handling hundreds of hospital bargaining unit cases over 13 years demonstrated that all such facilities were "remarkably uniform" and "virtually identical" is interesting, to say the least, when examined both in light of its past statement, noted earlier, that "[the] diverse nature of today's health care industry . . . precludes any generalization as to the appropriateness of any particular bargaining unit" (*St. Francis Hospital*, 271 NLRB 948, 953 n. 39 (1984)), and this Court's more general observation that "wide variations [and] complexities of modern industrial organization [preclude] the use of inflexible rules as the test of an appropriate unit." *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 134 (1944).

From this conclusion the Board created a Rule establishing fixed units, and through this Rule the Board proposes for the first time to deprive an employer of a meaningful opportunity to present evidence in the administrative proceedings regarding any of the factors relevant to the appropriate unit determination as they exist at the employer at the time when a petition for representation is actually filed.

Putting aside the facts that the Board flatly ignored substantial uncontradicted evidence both of an existing and of a developing diversity among hospitals, and that only a few years earlier the Board declared that its entire prior experience established that no generalizations could be made regarding appropriate units in the health care industry, it is nevertheless beyond dispute that the Board's Rule is premised upon very generalized findings. These findings are, in turn, based upon an amalgamation of evidence that does not directly relate, in toto, to any specific employer, and certainly does not directly relate to every employer. The typical hospital constructed by the Board from its hearings is much like the "average American family": it is a fictional model that bears no necessary relationship to any real situation. However, the Board would now apply its Rule to overlay fixed units onto a specific employer's operational and work force structures irrespective of, and, in fact, with express disregard for, whether the factors upon which the units were based are actually present in a manner resembling that which the Board has declared them to be.

While the court of appeals is correct that in most cases a rule "makes one or a few of a mass of particulars legally decisive, ignoring the rest" (Petitioner's App., pp. 15a), the instant Rule does not fit that description in any appropriate sense. Instead, it makes every otherwise relevant particular legally irrelevant by ignoring the entire mass. The only "particulars" that are decisive under the Rule are (1) that the employer is an acute care hospital and (2) that it has at least six of the types of employees that are included in the unit in question.

Because the Rule effectively prohibits the introduction and consideration of evidence regarding any of the otherwise relevant factors, it effectively reduces the employer's status and role in the proceedings to that of a mere observer. It does so even though determinations having a potentially significant impact upon the employer's constitutionally protected property and liberty interests are made in those proceedings. The opportunity to be heard in a meaningful manner and at a meaningful time requires more.

II

BY DENYING AN OPPORTUNITY TO BE HEARD THE RULE INCREASES THE POTENTIAL FOR THE ERRONEOUS DEPRIVATION OF A HOSPITAL'S LIBERTY AND PROPERTY INTERESTS

Recognizing the inflexibility of the Rule and its impact upon a changing health care industry, the district court stated:

> An adjudicated rule may be adapted to factual distinctions, whereas the Board's rule which predetermines units, necessarily ignores differences which, although the Board refers to them as subtle, may be the key to labor peace.

(Petitioner's App., p. 39a.) (Bracketed material supplied.) The inflexibility of the Rule, as opposed to case-by-case examinations or even rebuttable presumptions, can only substantially increase the likelihood that an erroneous decision will be reached, with the resulting unwarranted deprivation of the employer's property and/or liberty rights and interests. Indeed, since the Board did not find that the factors it has always considered relevant and central to the appropriate unit determination are no longer so in the case of acute care hospitals, the denial of the opportunity for an employer to show that the evidence regarding those factors varies in its case from that which formed the basis for the units contained in the Rule not only increases the likelihood of an erroneous decision in the case where factual differences exist, but practically assures an erroneous decision in the case where those differences are both substantial and widespread.

III

THE RULE IS IRRATIONAL AND DOES NOT SERVE ANY LEGITIMATE GOVERNMENTAL INTEREST

The Board's creation of an absolute Rule, in complete disregard for substantial and uncontradicted evidence establishing that hospitals are in the process of undergoing fundamental change, and that there is a substantial present and growing diversity among acute care hospital employers, is irrational. Although the Board cites several interests that it contends justify or support the Rule, in fact, the Rule serves or furthers no legitimate purpose or interest that warrants a denial of due process. *See Jackson Water Works, Inc. v. Public Utilities Comm.*, 793 F.2d 1090, 1097 (9th Cir. 1986). The interests cited by the Board include that of assuring the fullest freedom by employees to bargain collectively, that of creating certainty in the application of the Rule, and that of avoiding excessive or duplicative litigation.

Congress declared the purpose of Section 9 to be to assure employees the freedom to bargain collectively, and the unit determination was established as a central part of the process established by that Section. Specifically, Section 9(b) provides that in order "to assure to employees the fullest freedom in exercising the rights guaranteed by this Act," the Board is to determine the "unit appropriate for the purposes of collective bargaining." 29 U.S.C. § 159(b). As described above, such a unit is determined in proceedings under Section 9(c), 29 U.S.C. § 159(c), based upon the factors that the Board has identified and determined to be relevant over the course of several decades.

The Rule irrebuttably presumes that the relevant factors supporting a particular unit always exist in a certain fashion in acute care hospitals. If one accepts the proposition that the Rule's units are appropriate based upon the "facts" found by the Board in the rulemaking process (and FAHS does not concede that they are), then as long as the relevant factors also happen to exist in a given case as the Rule presumes they do, the resulting units would be appropriate. However, the mechanical application of the Rule to a setting where the factors simply do not exist in that fashion, or anything closely resembling that fashion, does *not* result in an appropriate unit. Since Congress has declared that an appropriate unit furthers the underlying statutory purpose, it would seem to follow that the Rule will likely frustrate rather than serve the

declared statutory goal and purpose of the Section 9 unit determination procedure since it will, in many cases, establish inappropriate units under the Board's own established standards.

In promulgating the Rule, the Board also stated that it sought to take advantage of the "certainty" that such a rule would offer. NPR I, 52 Fed. Reg. at 25145. FAHS concedes that the certainty of the Rule may be convenient and advantageous to the Board, and, for that matter, to labor organizations as well. FAHS also agrees with the court of appeals' observation that a result of a rule "is a gain in certainty, predictability, celerity, and economy, and a loss in individualized justice." (Petitioner's App., p. 15a.) FAHS would vigorously disagree, however, with any suggestion that "the tradeoff is worthwhile" in this case. Neither certainty nor the advantages it offers to the Board and/or labor organizations can take precedence over the express purposes of Section 9 or constitutional due process requirements. This is particularly so where that certainty is obtained at the expense of an employer's property and liberty interests, and under circumstances that, as shown above, may actually frustrate the statutory purpose of assuring employees of the right to bargain collectively in an effective manner by establishing units that are inappropriate rather than appropriate for such purposes.

Lastly, the Board supports its Rule on the basis that it is more effective than rebuttable presumptions in resolving the Board's concern about duplicative litigation. Final Rule, 54 Fed. Reg. at 16338-39. Given the Board's horrendous record in making health care unit determinations, one can appreciate that the Board would like to put an end to the seemingly endless series of appellate decisions rejecting its health care unit determinations and criticizing it for failing to heed past judicial direction. One can also make a strong, if not overwhelming, case that, in light of the employers' historical success rate before the courts, the Board and not employers must bear responsibility for that history of litigation. Be that as it may, however, the simple fact is that the Rule will not reduce litigation. If anything, litigation will, in all likelihood, increase.

In recognition of the due process issues posed by the irrebuttable and fixed units, the Board created in the Rule a so-called "extraordinary circumstances" exception. While, as discussed below, this exception is really no exception at all, it is, nevertheless, the only possible vehicle under the Rule by which an acute

care hospital employer may even attempt to establish that it does not fit the Rule's procrustean bed. As a result, one can reasonably anticipate that employers will challenge the Board's application and interpretation of the extraordinary circumstances exception, through the judicial processes established in Section 10 of the Act, 29 U.S.C. § 160, in every case where they believe that their own specific circumstances warrant or require the finding that a different unit is appropriate.

Moreover, although avoiding excessive or duplicative litigation may be a legitimate interest or concern, it must be served consistent with notions of due process, and not by simply ignoring or dispensing with them. *See Hardware Dealer's Mutual Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931); *Crane v. Hahlo*, 258 U.S. 142, 147 (1922). If that were not the case, then due process would have little if any meaning, since the easiest and best way to reduce litigation is simply to deny to one of the parties the right to participate in the process. Therefore, even if the Rule would actually reduce litigation, the Board cannot use its concern over litigation to justify the Rule's denial of due process to employers.

In fact, not only does the Rule serve no legitimate governmental interest, but it runs afoul of specific statutory language limiting the role that the "extent of organization" plays in determining appropriate units. At the same time that it restricted the employer's ability to contest the application of the Rule to "extraordinary circumstances," the Board specifically provided in the Rule that "combination" units may be appropriate if requested by a labor organization. 29 C.F.R. § 103.30(a) (Petitioner's App. p. 44a.) The only logical and practical reason for a labor organization to request a broader combination unit would be the extent of its organizing efforts (i.e., that, based upon its organizational efforts as of the time it files the petition, it believes it has the votes needed to prevail in an election in a broader combination unit). Since the Board has stated that variations in any or even all of the relevant circumstances at a specific facility from those it has found to exist throughout the industry will not be considered in unit determination proceedings, there is no basis left upon which the Board could find a combination unit appropriate, apart from the simple fact that the labor organization has requested it. Such a finding would be in direct disregard of Section 9(c)(5), which provides that the extent of organization cannot be controlling in

determining appropriate bargaining units. 29 U.S.C. § 159(c)(5).[6]

Thus, although the Board has articulated several interests which it claims are served by its Rule, an examination of the Rule and its workings clearly reveals that it serves none of them. As a result, the asserted interests do not justify the denial of the due process rights of acute care hospital employers.

IV

THE RULE'S "EXTRAORDINARY CIRCUMSTANCES" EXCEPTION IS A SHAM AND DOES NOT SATISFY DUE PROCESS REQUIREMENTS

As noted above, recognizing the due process issues raised by the Rule, the Board tacked on the "extraordinary circumstances" exception as a supposed cure-all. In presenting the exception to the court of appeals, the Board recited the following self-serving statements included in its comments accompanying the final rule:

> Other situations may occur in which a party may contend that the number of employees in the petitioned-for unit, or other circumstances may require deviation from strict application of the rule. Thus, the 'extraordinary circumstances' exception remains available . . . for any party who wishes to argue for any reason that the rule should not be applicable to its facility.

(Board's Brief to the court of appeals, pp. 26-27.)

The Board also used the "extraordinary circumstance" exception to attack the district court's characterization of the Rule as one that "mandates an absolute number of appropriate units and mandates a particular division of the work force, . . . in the health care field where employees' work environment vary widely." To convince the court of appeals otherwise, the Board stated that:

> . . . if there are material differences in working conditions at a particular acute care hospital which would differentiate it from the typical acute care hospital encompassed by the Rule, the atypical hospital may be able to make a showing of

[6] FAHS also notes that the establishment of different rules of decision and standards to be applied to employers and labor organizations would appear to violate at least the spirit of Section 9(c)(2), 29 U.S.C. § 159(c)(2).

> "extraordinary circumstances" which would exempt it from the coverage of the Rule.

(Board's Brief to the court af Appeals, p. 42.)

These descriptions of the "extraordinary circumstances" exception, standing alone, sound fair enough, and they apparently convinced the court of appeals, which characterized it as an "open ended exception for cases in which a party can demonstrate exceptional circumstances." (Petitioner's App., pp. 15a-16a.) The Board no doubt would also like this Court to believe that the exception actually satisfies all possible due process requirements. If the Board intended the exception to apply in the manner in which the term "extraordinary" is defined and commonly understood, or even in the manner it described to the courts below, then perhaps it might comport with minimal due process requirements. The Rule would then be more in the nature of a rebuttable presumption and in line with the decisional or adjudicatory rules that the Board has developed in the past for use in unit determinations. It would also then be more in keeping with the requirement that the Board make such determinations on a case-by-case basis.

Unfortunately, however, the Board has stated explicitly that the units established by the Rule are not rebuttable presumptions, and has gone to great lengths to define the "extraordinary circumstances" exception in such a manner so as to preclude its application in virtually every conceivable circumstance. When the Board first announced the "extraordinary circumstances" exception, it explained at length its interpretation thereof. That explanation, set forth below, demonstrates that, as the Board intends to apply it, the exception is no exception at all:

> [T]he Board wishes to emphasize that while the rule does not . . . conclusively establish invariable parameters of bargaining units in the industry, our intent is to construe the extraordinary circumstances exception narrowly, so that it does not provide an excuse, opportunity, or "loophole" for redundant or unnecessary litigation and the concomitant delay that would ensue. The Board has considered fully and at length all evidence presented and arguments submitted at the rulemaking hearings and during the comment period. None of the referred-to variations between the acute care hospitals, some of which are enumerated below, are matters

which would qualify for litigation under the special circumstances exception; rather, they are merely minor differences, inherent in the industry due to the multiformity of individual constituent institutions. *The Board deems such variations to be ordinary, and hence by definition not extraordinary, even in situations in which such variations may be highly unusual.*

Among the variations in acute care hospitals illustrated at the hearings and considered by the Board are arguments relating to: (1) Diversity of the industry, such as the sizes of various institutions, the variety of services offered by individual institutions, including the range of outpatient services provided, and differing staffing patterns among facilities (as, for example, a particular facility employing a larger or smaller number of RNs than generally employed by similarly situated hospitals); (2) increased functional integration of, and a higher degree of work contacts between, employees as a result of the advent of the multi-competent worker, increased use of "team" care, and cross training of employees; (3) the impact of nation-wide hospital "chains;" (4) recent changes within traditional employee groupings and professions, e.g., the increase in specialization among RNs; (5) the effects of various governmental and private cost-containment measures; and (6) single institutions occupying more than one contiguous building. Except as specifically noted elsewhere (e.g., exclusion of psychiatric hospitals and nursing homes from coverage by the rule), *the Board has concluded that none of the arguments raised in the course of the rulemaking procedure, including those listed above, alone or in combination, constitutes an "extraordinary circumstances"* justifying an exception from the rule.

The Board is well aware that facilities will, and do, differ in some respects; however, as we have observed in the NPR (52 FR 25144), it is the Board's considered judgment, after issuing healthcare decisions by adjudication for more than 13 years, that acute care hospitals do not differ in substantial, significant ways relating to the appropriateness of units. Moreover, to the extent that the rulemaking hearings demonstrated that at least in some respects acute care hospitals do vary, the Board has made a judgment that, in this area of establishing appropriate units, "[d]etailed analysis of all the facts of the particular case are just not that

enlightening" and that the policies of the Act would better be effectuated by the establishment of appropriate units in the enumerated segments of this industry by exercise of the Board's section 6 rulemaking authority.

To satisfy the requirements of "extraordinary circumstances," a party would have to bear the "heavy burden" to demonstrate that "its arguments are substantially different from those which have been carefully considered at the rulemaking proceeding" as, for instance, by showing the existence of such unusual and unforeseen deviations from the range of circumstances revealed at the hearings and known to the Board from more than 13 years of adjudicating cases in this field, that it would be unjust or an abuse of discretion for the Board to apply the rules to the facility involved. [Footnotes omitted.]

NPR II, 53 Fed. Reg. at 33932-33 (emphasis supplied). The Board also made it clear that the variations described are merely illustrative of, and not exclusive or exhaustive of, the types of variations that it will not consider. 53 Fed. Reg. at 33932, n.31.

In announcing the final Rule, at the same time that it made the earlier quoted statement suggesting that the exception might actually have some meaningful application, the Board expressly reaffirmed its original interpretation set forth above. Final Rule, 54 Fed. Reg. at 16345.

The inclusion of the "extraordinary circumstances" exception in the Rule does no more than pay lip service to a hospital's due process rights, since the Board has excluded from that exception evidence relating to virtually every factor that has ever been considered relevant to unit determinations. Indeed, the Board has, as a practical matter, even foreclosed a hospital from effectively invoking the "extraordinary circumstances" exception where it has made sweeping, innovative changes both in its operations and in the structure, utilization and makeup of its workforce, which changes vary substantially from any of the circumstances found to be uniformly present by the Board in the rulemaking process. The Board has unequivocally stated that any such evidence would be considered "ordinary" and "by definition not extraordinary, *even in situations in which such variations may be highly unusual*", or where a number of such variations exist "*in combination.*" (NPR II, 53 Fed. Reg. at 33932) (emphasis supplied). Thus, the Board

has held out the "extraordinary circumstances" exception to "satisfy" due process, only to take it back through a not-so-subtle exercise of lexicological sleight of hand.

Finally, although the Board has attempted through general statements to show the significance of its "extraordinary circumstances" exception, it is both notable and revealing that the Board, was, and apparently is, unable to offer a single example (other than the "5 employees or less" exception expressly set forth in the Rule) of what might actually constitute an "extraordinary circumstance." This is, of course, because the Board has never actually intended for there to be any "extraordinary circumstance" and, based upon its own definition of what is not "extraordinary," it, like everyone else, is unable to conceive of one.

Since the Rule has a substantial impact upon a hospital's constitutionally protected interests, and, despite the "extraordinary circumstances" exception, effectively precludes any opportunity for a hospital to be heard at a meaningful time (i.e., at the time the Rule is being applied to that hospital), it denies the acute care hospital employer procedural due process in violation of the Due Process Clause, and is, therefore, invalid. [7] *See*

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[7] As noted earlier, at the same time that it created the narrowly construed "extraordinary circumstances" exception to be applied to the acute care hospital employer, the Board provided an option to labor organizations to request and obtain units other than those established by the Rule. The Board mandated that the Rule's eight units are the "only" appropriate units, "*except that,* if sought by labor organizations, various combinations of units may also be appropriate . . . ." § 103.30 of the Final Rule (Petitioner's App. p. 44a) (emphasis supplied). This exception for labor organizations also raises equal protection issues. Under the equal protection standard applicable to regulation of economic and commercial matters, challenged distinctions will only be sustained if the governmental agency could have reasonably concluded that it would promote a legitimate government purpose. *Exxon Corp v. Eagerton,* 462 U.S. 176 (1983). In Section 9 proceedings, both the employer and the labor organization are similarly situated—each is a party to the representation hearing, and the collective bargaining rights, obligations and restrictions of each will be determined through that process. However, the Board has determined that only in extraordinary circumstances (which it very narrowly defined) can a hospital challenge the appropriateness of the eight bargaining units in its facilities, while, in contrast, a labor organization is granted a broad exception to seek a bargaining unit other than one of the eight bargaining units provided for in the Rule.

Both labor organizations and hospitals had the opportunity to present their respective views on the appropriateness of the proposed rule. After these hearings the Board then determined that the *only* appropriate units would be the eight proposed units. The Board's grant of an exemption for labor organizations to in essence "relitigate" or "reopen" this issue, while denying that same opportunity to the employer, is not based upon any legitimate purpose. In support of this exception, the Board pointed out that since it has already determined that the dictated number of units do not proliferate, a petition for a combination of units would be appropriate, since it would proliferate even less. NPR I, 52 Fed. Reg. at 25145. It is noteworthy that the units that employers typically seek in unit determination proceedings are what would be "combination" units under the Rule (i.e., "all professionals" "service and maintenance", "service, maintenance and technical", etc.). There is simply no legitimate basis, either in the record or in logic, for granting this exemption to a labor organization but not to a hospital employer. A combination unit proposed by the employer would be every bit as nonproliferative as it would be if it were proposed by the labor organization.

Hardware Dealer's Mutual Fire Ins. Co. v. Glidden, 284 U.S. 151, 158 (1931); *Crane v. Hahlo,* 258 U.S. 142, 147 (1922).

CONCLUSION

For the reasons advanced by the AHA, and for the reasons set forth above, FAHS respectfully requests that the Court grant AHA's petition for a writ of certiorari and that it reverse the Seventh Circuit Court of Appeal's denial of a permanent injunction.

Respectfully submitted

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